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Supreme Court, U.S.
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No. 93-934

In the
Supreme Court of the United States
October Term, 1993

ROSS ALAN LANDRO,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was Petitioner's right to an impartial jury as guaranteed by the Sixth Amendment to the United States Constitution violated when a single juror committed misconduct by contacting a media representative about covering the case when his action was unknown to the other jurors and the outside contact did not influence the verdict?

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MINNESOTA SUPREME COURT

Respondent, State of Minnesota, respectfully prays that the Petition For A Writ of Certiorari be denied by this Court. The Minnesota Supreme Court

opinion is reported as State v. Landro, 504 N.W.2d 741 (Minn. 1993) and is attached to the Petition as Appendix A, P.P. A8-A30.

STATEMENT OF THE CASE

The following is extracted directly from State v. Landro, 504 N.W.2d 741 (Minn. 1993) and provides a comprehensive Statement of the Case:

> "Jessie Adams was shot to death during the early morning hours of December 7, 1991 outside of Born's Bar, St. Paul.[1] Appellant[2] and a friend, James Taylor, spent most of

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1. Adams was African American. Generally the race of the key players in a crime is not relevant. In this case, however, there was some evidence indicating that the races of various parties and ensuing racial conflict precipitated the crime.

2. Appellant is Native American; it appears from the record, however, that he is sometimes mistaken as Caucasian.

the day of December 6, 1991 together. At about noon they met at a friend's house. According to James' testimony, appellant showed him a .22 caliber revolver that he kept in the waistband of his pants. Appellant's testimony differed: he testified that the gun belonged to James. Accompanied by James, appellant purchased some shells for the gun at 2:19 p.m. from a sporting goods store. The purchase of the bullets was corroborated by an employee of the store and a sales record; appellant testified, however, that James had wanted to buy the bullets and that he did not purchase them but was merely lending James the money. James testified that appellant then loaded the gun and put some shells in his pocket.

Around 5:00 p.m., they were joined by James' younger brother, Jeffrey. The three then went to several shopping malls where they either stole things, returned stolen goods for money, or both. Afterward, they bought some beer at a liquor store and stopped at a couple of bars.

At about 10:30 p.m. the three arrived at a friend's house. According to the testimony of the Taylor brothers, Appellant tried to sell the gun for $25. Appellant denies that he had attempted to do so. Testimony at trial indicated, however, that after appellant

attempted to sell the gun, the prospective buyer handed the gun to James who tried to take it. At this time, appellant announced that it was his gun, took it and tucked it into his pants. The three left at approximately 11:00 p.m. They went to a bar where James almost got into a fight. Next they went to the home of another friend. An argument developed between James and this friend. According to the friend's mother, appellant helped escort James out and apologized for the behavior. They left about midnight. They arrived at Born's Bar at about 12:30 a.m. Jesse Adams was at Born's with Cheryl Clark, the mother of his fiancee. Appellant and the Taylors joined a group of friends. The bartender testified that their group was loud and described a wrestling match involving the Taylors shortly before closing that resulted in a broken glass. After the bartender took the Taylors' drinks away, James accused Adams and one of Adams' friends of having stolen them.

At closing time, appellant's group left first, Adams and Clark were close behind. At this point, the testimony of the state's witnesses diverged. According to James, their group was out on the sidewalk and a black female--presumably Cheryl Clark--continued to make comments directed at them as she had earlier in the bar. James claimed that he

told her to "get the f___ out of here," and that Adams then took off his coat and started to come after James.

Clark testified differently. She said that a group of whites--presumably the Taylor group--confronted them 10-15 feet from the front door and asked them, "What the hell you doing in this neighborhood?" She testified that then one man--presumably James Taylor--emerged from the group. Adams told the man to leave him alone. In response the man began swinging at Adams. Clark's testimony continued that Adams, with his hands at his sides, said he did not want any trouble, but that the man responded, "I'll f___ you up, nigger." Clark continued that a second man, taller and thinner than the first, then joined the first man.

A fight broke out and Clark went to her car to get a mallet. When she returned, she said that the taller man said "I got something for you, too, bitch." She said that he opened his jacket and that she saw the butt end of a gun. At trial, Clark identified appellant as this man. Previously, however, she had identified James Taylor as the man with the gun. She returned to the bar to get help and was pounding on the windows when she heard the firing of two shots. The Taylors returned to the bar a few minutes later.

Clark originally identified them as the two involved in the shooting. At trial, however, she said she was no longer certain.

The Taylor brothers told a different story. They described how Adams and James fell to the ground and started wresting, with Adams on top. They testified that neither Adams nor James had weapons. Jeff testified that he was standing near his brother's head and watched Landro take out his gun and shoot Adams three or four times. After the shots were fired, James pushed Adams off. The Taylors testified that appellant then shot Adams one more time. They testified that appellant ran towards his car and they went back to the bar.

Appellant's testimony differed. He testified that when he arrived at Born's bar with the Taylors, he ordered a pitcher of beer. Tired of the commotion that seemed to follow James, he opted instead to spend some time visiting with other people he knew. He testified that he heard the Taylors fighting and heard a glass break. He decided to leave, placed his pitcher on a table and announced that he was leaving. He testified that the Taylors told him that they would be out in a minute.

Appellant testified that he next went to his car and smoked a

cigarette while he waited for the Taylors. He testified that he thought he remembered hearing something that sounded like fighting and gun shots, assumed that the Taylors were involved--because James Taylor, according to appellant's testimony, was always causing trouble--and decided to leave.

Upon leaving, appellant testified that he drove to the house of a friend, Wanda Peterson. She testified that when appellant arrived, he was nervous and had a gun. Using her telephone, he telephoned some friends to find out what had happened. He talked with a friend who told him that the Taylors were saying that he, appellant, had shot someone. Appellant testified that at first he thought it was a joke, but then he heard the voices of the Taylors in the background. Appellant testified that Jeff was saying that he would not go to jail for something he had not done; James was saying "Ross did it, Ross did it." Appellant denied having done so and got off the phone.

During the next time period, there seems to be a hole in appellant's story. In his original statement, he testified that he had only been at Peterson's house a minute. At trial he elongated tnis to an hour or more. In any event, he testified that he next drove to the home of yet more

friends. When he arrived there, a cab was arriving; the Taylor brothers came out of the house and Jeff got into the cab. The driver's records establish that this was at about 3:19 a.m.--James got into appellant's car; appellant asked him what had happened. Appellant testified that James told him, "Oh man, I got some problems," but "This guy ain't got no problems no more." James did not want to discuss the shooting further.

Appellant and James drove to a friend's house, where they spent the rest of the night. Appellant testified that James was acting "weird, nervous [and] scared," and at one point said something about appellant having shot someone. In the morning, appellant agreed to give James a ride to Minneapolis. When he left the next morning, Appellant testified that he asked the friend to give him some clothing for warmth and she did so. Appellant was taken into custody while leaving the house.

The grand jury indicted appellant on January 22, 1992. The trial began on June 1, 1992. Both of the Taylors testified. On June 10, 1992, after the evidence had concluded but before closing arguments and jury instructions, one juror, Dan Williams, telephoned a local anchorperson, Diana Pierce. Williams had talked to her earlier during the trial and told her that she would

find the case "very interesting." During the telephone call and previous conversation, he did not discuss the case at length, but rather suggested that she obtain a transcript. The comments he made about the substance of the trial were limited to his expressing skepticism as to the testimony of the defense investigator. He also testified that he thought that the case raised similar issues to the Rodney King incident and trial. The acquittal and subsequent riots had been publicized shortly before this trial began. He told Pierce the names of the defendant, the judge and the attorneys. The conversation lasted about 10 minutes. At the subsequent hearing, Pierce testified that Williams said, "I wanted to talk to you about the case * * * going on in St. Paul that I had briefly mentioned two weeks prior." He also told her that he was willing to make himself available for an interview after the verdict was returned which could be as early as the following day. Pierce testified that she did nothing in response to the call except telephone the court two days later to inform it of the conversation.

On June 11, 1992 the attorneys gave their closing arguments, the jury was instructed, then sequestered at 11:54 a.m. Juror Williams was elected foreperson. The jury returned a verdict of guilty of first and second

> degree murder at 4:57 p.m. Appellant was sentenced that afternoon.
>
> Appellant moved for a new trial based upon juror misconduct. The court held a hearing at which Williams, Pierce and ten of the other jurors testified. Ten of the jurors were called and none testified that they knew Williams had contacted Pierce. The court denied the motion ruling that although it was juror misconduct for Williams to have contacted Pierce, it had not prejudiced the verdict."

Id., 504 N.W.2d at 742-744 (emphasis in original). The Minnesota Supreme Court affirmed Petitioner's conviction, specifically holding that the trial court did not abuse its discretion in denying the motion for a new trial based upon juror misconduct. Id., 504 N.W.2d at 744-745.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

The case at bar does not present any special or important reasons why certiorari should be granted. While a Sixth Amendment issue has been presented by Petitioner, it is neither unsettled in nature nor does it merit further consideration, There is no conflict in decisions that might necessitate review nor did the Minnesota Supreme Court misapply any controlling principles of constitutional law set forth by this Court. In addition, the decision below turns upon its own facts and will affect few other litigants.

1. The Procedure Utilized Was Constitutionally Proper

In Remmer v. United States, 347 U.S. 277 (1954), this Court held that any private communication or contact in a criminal case with a juror during a trial about the matter pending before the jury creates a rebuttal presumption of prejudice. Id., 347 U.S. at 229. The prosecution bears the burden of showing that such contact with the juror was harmless to the defendant. Id. Those rules established in Remmer have been adopted by the Minnesota Supreme Court. See e.g., State v. Cox, 322 N.W.2d 555, 558-559 (Minn. 1982); State v. Sanders, 376 N.W.2d 196, 205 (Minn. 1985).

The role of the trial court is to conduct a hearing to determine the circumstances surrounding the outside

contact, the impact upon the juror and whether or not it was prejudicial. Remmer v. United States, 347 U.S. at 229-230. Once again, Minnesota incorporated this practice for trial courts in their investigation of alleged juror misconduct. Schwartz v. Minneapolis Suburban Bus Co., 258 Minn. 325, 104 N.W.2d 301 (1960).

This, of course, is exactly what occurred in the case at bar. The trial court held a hearing at which Williams, Pierce, and ten of the other jurors testified. State v. Landro, 504 N.W.2d at 744. The purpose was to determine the nature of the misconduct and whether its impact upon Williams or the other jurors had caused prejudice to Petitioner. Thus, there was no constitutional

deficiency in the procedure utilized by the Minnesota courts.

2. The Factors Used To Determine Whether Prejudice Has Resulted Do Not Violate The Sixth Amendment

Minnesota has established a four factor test in the aforementioned Cox case to determine whether prejudice has resulted from outside influence based upon a juror's communication with others about the case. They are:

(1) The nature and source of the prejudicial matter;

(2) The number of jurors exposed to the influence;

(3) The weight of evidence properly before the jury; and

(4) The likelihood that curative measures were effective in reducing the prejudice.

State v. Cox, 322 N.W.2d at 559. This was the analysis used by the Minnesota Supreme Court in the case at bar. State v. Landro, 504 N.W.2d at 745.

Contrary to Petitioner's argument, there is no constitutional impediment to this test. It is plainly aimed toward the goal of Remmer, i.e., to insure that a jury has not been prejudiced by any outside influences. Moreover, Petitioner has taken a narrow, "tunnel vision" approach by focusing his argument in support of certiorari solely upon the third Cox factor. See Petition, P. 11. The statement that "[u]nder Cox, the only burden the prosecution simply needs to show is that the defendant would have been found guilty regardless" is simply not true! Petition, P. 11. The remaining

Cox factors are equally, if not more, crucial to the determination that a defendant has had a trial by an impartial jury based only upon the evidence adduced in court. This, of course, is the underlying philosophy of the Sixth Amendment's right to a fair trial by an impartial jury. Turner v. Louisiana, 379 U.S. 466 (1965); Parker v. Gladden, 385 U.S. 363 (1966). When all four factors are considered in their totality, they are plainly relevant towards this determination and not in violation of the Sixth Amendment.

Petitioner, in essence, is requesting that the presumption of prejudice should be considered irrebuttable in situations involving intentional juror misconduct. Such a position, however, is contrary to

the directives of Remmer, which focuses upon the affect of the misconduct rather than the misconduct itself. Id., 347 U.S. at 229-230. It is also incompatible with the theory underlying the Sixth Amendment, for the key inquiry in determining a trial by impartial jury violation is whether the jury has become biased by reason of outside influences. Turner v. Louisiana, 379 U.S. at 472-473. Petitioner's strict liability argument must fall because the intentional nature of the misconduct does not by itself have any rational, automatic nexus with the lack of impartiality needed to establish his requested Sixth Amendment violation.

This Court has clearly instructed that an alleged violation of the Sixth Amendment right to trial by an impartial

jury should involve an examination of the factual circumstances surrounding the misconduct AND its impact upon the verdict. Turner v. Louisiana, 379 U.S. at 471-474; Parker v. Gladden, 385 U.S. at 364-366. The Cox factors are not constitutionally defective because they properly focus upon these elements.

3. The Cox Test Was Properly Applied To The Facts Of The Case

Irrespective of how one labels Williams' misconduct, the bottom line is that his actions did not deprive Petitioner of his Sixth Amendment right to a trial by an impartial jury. While there may have been outside contact, there was neither outside influence nor prejudice to Petitioner, both of which are at the heart of any Sixth Amendment analysis. A brief review of the Cox

factors will show that this is a case which turns upon its own facts without any constitutional implications.

First, the nature and source of the misconduct did not harm Petitioner. Williams, who knew Pierce from a prior unrelated incident, was merely bringing to her attention what he believed to be a newsworthy story. Rather than discuss the evidence specifically, Williams, at all times, urged her to obtain a transcript and stated he would be available for an interview only after the verdict was returned. There was no discussion of Petitioner's guilt or character and the record clearly discloses that Pierce never attempted to exert any influence over the juror. While Williams may have technically

violated the court's instructions about discussing the case, there was nothing in the nature of his conduct which prejudiced Petitioner.

Secondly, Williams was the only juror exposed to the outside contact. The remaining jury members were not even aware of the conversations between Pierce and Williams. Furthermore, Williams expressly testified at the hearing that his contact with Pierce did not play any role in his decision to convict. While Petitioner challenges Williams' credibility, the trial judge was clearly within his discretion to believe the juror's testimony. See Petition, P. 12.

Thirdly, the weight of the evidence was correctly described as "overwhelming." State v. Landro, 504

N.W.2d at 745. The victim's companion, Cheryl Clark, saw Petitioner with a gun in the waistband of his pants moments before the shooting. The Taylor brothers described how Petitioner shot Adams when the victim started winning the physical fight with James Taylor. Wanda Peterson saw Petitioner acting nervous and in possession of a gun shortly after the shooting. On the other hand, Petitioner's story changed several times and his alibi was essentially uncorroborated. Thus, Williams' actions were inconsequential when measured against the evidence of guilt properly before the jury.[3]

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3. The fourth Cox factor involving the effectiveness of curative instructions is inapplicable to this case because the misconduct was not discovered until after the verdict.

In summary, Petitioner has not presented any compelling reasons for this Court to grant certiorari. Williams' misconduct did not prejudice Petitioner nor did it affect any juror's ability to fulfill their role in an impartial manner. The case turns upon its own facts, without any evidence of outside influence that rises to the level of a Sixth Amendment violation.

CONCLUSION

For the reasons stated herein, the Petition For A Writ Of Certiorari should be denied.

Dated: January 5, 1994

Respectfully submitted,

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